On June 25, 2021, the Supreme Court ruled 5-4 that only a portion of our class of consumers in *Ramirez v. TransUnion, LLC* had Article III standing to obtain a remedy in federal court. *TransUnion, LLC v. Ramirez*, ___ S. Ct. ___, 2021 WL 2599472 (June 25, 2021). Although the jury found in favor of all 8,100 plus class members, and the trial and appellate courts agreed, the majority of the Supreme Court ruled that approximately 6,300 of the class members had no standing to recover their portion of the judgment – but 1,850 plus class members did. Four of the Justices in a dissent authored by Justice Thomas indicated that with the majority's ruling only state courts would have jurisdiction over claims such as those of the 6,300 plus class members. The case was remanded for further proceedings.

First, we are pleased that 1,850 plus of our class members, including lead plaintiff Sergio Ramirez, had their rights vindicated. All 9 Justices recognized that harm is caused every time a credit report with a false criminal alert or with other defamatory information on it is sold to a third party. This ruling would be equally applicable in cases of defamatory employment background checks sold to employers and/or defamatory tenant screening reports sold to landlords. The decision also stands for the proposition that Fair Credit Reporting Act ("FCRA") statutory and punitive damages class actions are appropriate so long as there is third party publication or some other concrete injury for every class member. This is no small feat given that there were hardly any FCRA section 1681e(b) class actions a decade ago. Now they have the Supreme Court's seal of approval where a uniform defamatory statement is sold by a consumer reporting agency to a third party in a credit report.

But second, we are obviously disappointed with the Court's decision with respect to the 6,300 plus consumers, and we are exploring available options for these class members. As Justice Thomas's and Justice Kagan's dissents passionately explain, the majority used this case to take power away from Congress, but not state courts. It ruled that it will allow consumers to have a remedy in federal courts only when *it* deems one appropriate, regardless of what Congress found in enacting a statute that the President signed into law and regardless of whether a unanimous jury found that the statute was violated, and violated willfully and repeatedly. 2021 WL 2599472, at *21, 23 n. 9.

Allowing illegal conduct to go unremedied is not the correct outcome, especially so when our democratic institutions have provided through properly-enacted laws that ordinary citizens can seek and recover a statutory remedy for themselves in the courts when their personal rights are violated. The majority's power-grab over Congress is detrimental to our democracy and to individual liberty.

Despite the decision in *TransUnion LLC v. Ramirez*, the firm of Francis Mailman Soumilas, P.C. will continue to fight for ordinary people and for democratic values using properly enacted laws.

As a practical matter, we believe that the *TransUnion* decision will not have a noticeable impact in most individual FCRA and other consumer cases seeking actual damages. In fact, it might make it easier to establish at least a threshold harm of defamatory credit reporting, as discussed below. The decision is at its core about the statutory damages remedy and class actions. Whether bringing individual or class cases, we urge the consumer advocacy bar to consider the following:

(1) With respect to FCRA section 1681e(b) cases, having evidence of an inaccurate third party report is vital. *TransUnion* can be cited for the proposition that every Justice on the Supreme Court thinks that a concrete injury or harm is present in every case of such a false third party report. 2021 WL 2599472, at *11, 14 ("We have no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact." "The 1,853 class members . . . suffered a harm with a 'close relationship' to the harm associated with the tort of defamation." "[T]he 1,853 class members (including Ramirez) whose credit reports were disseminated to third-party businesses during the class period suffered a concrete harm."). The mere publication of this false defamatory information was the harm in *TransUnion*; no credit denial and no further or consequential harm was necessary, even with a "potential" match to the OFAC list qualifier on the reports. Obviously practitioners should avoid FCRA section 1681e(b) cases where the inaccuracy is only in what the majority called "internal credit files," or what are usually called file disclosures.

(2) With respect to FCRA section 1681g disclosure claims, the *TransUnion* decision held that the "formatting defects" unique to that case were not harmful enough to the class. 2021 WL 2599472, at *3. Ramirez himself was found to have standing for the section 1681g claims. *Id.* at *15 n.8. The section 1681g issues in *TransUnion* were rather unusual, because for a 7-month period in 2011 Trans Union send to consumers both a traditional file disclosure and a separate disclosure letter about OFAC Alerts. This practice does not exist anymore at Trans Union or at any other credit reporting agency to our knowledge. Although we argued this was more than just a problem of incorrect "formatting," the Supreme Court majority decision discusses the section 1681g claims as a "formatting defect" case only. The *TransUnion* decision does not reach the issue of whether concrete injury can be caused by a *misleading* or an *untimely* FCRA disclosures. Several circuit court decisions following *Spokeo* have provided guidance on these issues that in our view continues to be good law. There is some harmful *ditca* in the *TransUnion* opinion, however, made in connection with discussing the arguments of the U.S. Justice Department and of several *amicus curiae*: the Supreme Court stated that an incomplete or non-existent FCRA disclosure must have some "downstream consequences" or "adverse effects" in order for there to be standing for such a claim in federal court, and favorably cited the Eleventh Circuit's *Trichell* decision on this point. *Id.* at *15-16.

(3) The *TransUnion* decision has some good language to support the proposition that difficult to quantify and intangible harms are recoverable and appropriate in FCRA cases. *Id.* at *11, 14 (" . . . class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III."); *Id.* at *13 (" . . . 'the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.' "); *Id.* at *7 ("Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. . . . Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion.")) (internal citations omitted).

(4) Also relevant to the FCRA, the Supreme Court rejected the argument, popular among some consumer reporting agencies, that a defamatory statement can become benign if the agency puts a qualifier such as "potential" in front of it. TransUnion argued that it was not "technically" false

to say that the consumer were a "potential" match to the OFAC list. The Supreme Court found that "[t]he harm from being labeled a 'potential terrorist' bears a close relationship to the harm from being labeled a 'terrorist.' In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement." 2021 WL 2599472, at *11. When that type of misinformation is "disseminated to third parties" a concrete injury is presumed. *Id.* This should help consumer advocates put an end to the defense argument that consumer report information can be both technically accurate and not misleading in such a way that has an adverse effect – defamatory information, even with a qualifier like "potential" in front of it, can be presumed to have an adverse effect.

(5) Finally, consumer advocates should consider filing FCRA cases in state court. This should be done in a very thoughtful and deliberate manner and only in jurisdictions where state standing principles are favorable. The Minnesota Law Review article cited by Justice Thomas below is a good place to begin. *See id.* at *23 n. 9. State court will be the next battleground for years to come, as it has already been for FACTA cases following *Spokeo*, so all consumer advocates need to be very selective in any statutory damages FCRA case they bring in state court. If the state venue and state standing laws are good, state courts can be a great alternative for those federal statutory rights claims that will go unenforced in federal courts. As Justice Thomas's dissent notes:

> Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law," *ASARCO Inc. v. Kadish*, 490 U. S. 605, 617 (1989)—as the sole forum for such cases, with defendants unable to seek removal to federal court. See also Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 Minn. L. Rev. 1211 (2021). By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.

2021 WL 2599472, at *23 n.9.

Many thanks to the scores of you who have provided us with advice, encouragement and support during this long war towards consumer justice. It continues.

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June 28, 2021, Philadelphia